could retain ownership over the wiring -- and these expectations should not be subject to interference by the implementation of new Commission rules with retroactive application.

Prospective application of rules promulgated pursuant to Section 16(d) is also consistent with established principles of administrative law:

Retroactive measures -- whether promulgated by a legislature or by an administrative agency -- have traditionally been subjected to stricter scrutiny than have prospective measures. Thus. . .the validity of a prospective regulation by an administrative agency 'will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.' In contrast, 'courts have generally compared the public interest in the retroactive rule with the private interests that are overturned by it' in deciding whether to uphold a retroactive promulgation. Such disparate treatment is justified because retroactive laws interfere with the legally-induced and settled expectations of private parties to a greater extent than do prospective enactments.<sup>42</sup>

Furthermore, "[r]etroactive application of policy is disfavored when the ill effects of such application will outweigh the need of immediate application. . .or when the hardship on affected parties will outweigh the public ends to be accomplished." 43

<sup>&</sup>lt;sup>42</sup>Daughters of Miriam Center for the Aged v. Mathews, 590 F.2d 1250, 1259-60 (3d Cir. 1978) (footnotes omitted; quoting Mourning v. Family Publications Service, Inc., 411 U.S. 356, 369 (1973) (quoting Thorpe v. Housing Authority, 393 U.S. 268, 280-81 (1969)); Adams Nursing Home of Williamstown, Inc. v. Mathews, 548 F.2d 1077, 1080 (1st Cir. 1977)).

<sup>&</sup>lt;sup>43</sup>Iowa Power and Light Co. v. Burlington Northern, Inc., 647 F.2d 796, 812 (8th Cir. 1981) (citations omitted), cert. denied, 455 U.S. 907 (1982); see also Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."); Yakima Valley Cablevision, Inc. v. FCC, 794 F.2d 737, 745-46 (D.C. Cir. 1986) (when parties have

Thus, in the case of home wiring, the burden of proving the necessity of retroactive application is a heavy one that most likely cannot be met in light of the well-settled expectations of both cable operators and subscribers under the current regulatory scheme.

If the Commission finds that it must apply its home wiring rules retroactively, it should, at a minimum, limit the scope of Section 16(d) so that it does not disturb any preexisting contractual arrangements between cable companies and subscribers relating to the ownership of internal cable wiring. For example, rules implemented pursuant to Section 16(d) should not be read such that they interfere with written documentation, presented to the subscriber by the cable company upon installation of internal cable wiring in the subscriber's home, that contains language specifically stating that the cable company retains ownership over all cable wiring installed even after termination of service. All such preexisting contractual agreements should be enforceable as agreed to, and should not be subject to any retroactive application of rules implemented pursuant to Section 16(d).

relied on a lawful regulation and planned their activities accordingly, retroactive modification of the regulation can cause "great mischief," which must be balanced against any salutary effects of retroactivity); <u>United States v. Exxon Corp.</u>, 561 F. Supp. 816, 836 (D. D.C. 1983) ("Among the factors weighing in the balance are the extent to which a party has relied on previously settled law and the burden which the retroactive rule would impose on a party."), <u>aff'd</u>, 773 F.2d 1240 (Temp. Emer. Ct. App. 1985), <u>cert. denied</u>, 474 U.S. 1105 (1986).

# VII. THE COST OF MAINTAINING AND REPAIRING INTERNAL CABLE WIRING MUST BE ADDRESSED IN THE RATE RULEMAKING.

The current NPRM acknowledges that cable wiring, unlike telephone wiring, has the potential for signal leakage, and that the Commission holds cable operators responsible for such leakage.44 Accordingly, the Commission has invited comments concerning issues relating to prevention of signal leakage and maintenance of cable wiring. 45 Congress has indicated that it intends cable operators to continue to be legally responsible for preventing signal leakage, reasoning that they are best equipped to achieve proper installation and maintenance of the wiring so that it does not leak signals. 46 Indeed, it is currently the cable operator's responsibility to maintain the wiring so that it meets Commission criteria for signal leakage47 and certain technical standards, such as signal quality and strength. 48 Failure to comply with any of these criteria could result in steep fines or a shut-down by the Commission until the system comes into compliance.49

<sup>44</sup>NPRM at ¶ 6; see also 47 CFR § 76.611.

<sup>&</sup>lt;sup>45</sup>NPRM at ¶ 6.

<sup>&</sup>lt;sup>46</sup>House Report at 119.

<sup>&</sup>lt;sup>47</sup>See 47 CFR § 76.611.

<sup>&</sup>lt;sup>48</sup>See 47 CFR § 76.605.

<sup>&</sup>lt;sup>49</sup>See FCC Policy Statement -- Standards for Assessing Forfeitures, FCC 91-217, released August 1, 1991 (App.); 47 CFR § 76.611.

While cable operators may indeed be better equipped to maintain and repair cable wiring so that it does not leak cable signals, the Commission must recognize that the cable operator incurs significant costs relating to the maintenance and repair of internal cable wiring. In an unregulated environment, the usual practice has been for cable operators to maintain and repair cable wiring at no charge to the subscriber. However, as the cable industry enters a heavily rate-regulated environment under the 1992 Act, the cable operator should be permitted to charge for any necessary maintenance and repair to the internal wiring within a subscriber's premises, particularly given that cable operators are responsible for prevention of signal leakage and for signal quality regardless of who "owns" the internal wiring.

The Senate Report suggests that home wiring maintenance might be an "unnecessary charge" against which consumers should be protected. The Commission cannot, however, regard home wiring maintenance as an unnecessary charge, especially in light of the penalties to which the cable operator is subject, and the recognized importance of preventing even small leaks that may interfere with critical over-the-air services such as aeronautical and safety services. Indeed, allowing for

<sup>&</sup>lt;sup>50</sup>Senate Report at 23.

<sup>&</sup>lt;sup>51</sup>See House Report at 119; NPRM at ¶ 6; see also Dorfsman, supra, at 11CN, p. 38, col. 1 (leaking signal near Chicago's O'Hare Airport interrupted the airport's control tower signals to an incoming plane; source of the interruption was traced to illegal splices in nearby cable television lines).

recovery of maintenance and repair costs is consistent with Congress' apparent intent to avoid "frustrat[ing] the cable operator's ability to prevent or protect against signal leakage during the period the cable operator is providing service to such subscriber." Similarly, upon termination of service by the subscriber, the cable operator must be allowed to take whatever steps may be necessary to insure that the disconnected cable is properly capped to prevent leakage, regardless of whether the internal wiring is acquired by the former subscriber.

The Commission should follow principles similar to those it established in the inside telephone wiring detariffing decisions even though, in the context of telephone wiring, maintenance did not involve prevention of signal leakage. In the case of inside telephone wiring, the cost of maintenance and repair thereof is now the responsibility of the subscriber. Although the telephone company may perform the maintenance and repair work, the subscriber can now be charged for such services. Internal cable wiring should be handled similarly — the cable operator who maintains and repairs that wiring so that it meets Commission standards should be able to charge the subscriber for such maintenance and repair. Clearly, such costs must be recoverable pursuant to any rules adopted by the Commission in accordance

<sup>&</sup>lt;sup>52</sup>House Report at 119.

<sup>53</sup> See Inside Wiring Detariffing, 61 RR 2d 908.

with Section 3(a) of the 1992 Act. Moreover, the cable operator should be provided with maximum flexibility in recovering such maintenance and repair costs, e.g., as part of the recurring basic rate, through charges reflecting the additional costs of multiple cable outlets in a home, by offering home wiring maintenance agreements, by assessing a separate charge for each repair call, etc. However, issues relating to the costs of cable maintenance and repair are perhaps best addressed in the Commission's comprehensive rate proceeding, rather than pursuant to the present NPRM. 55

#### VIII. REGULATION OF HOME WIRING ACQUISITION PRICES.

The Commission has invited comment on "whether and how [it] should set limits on the amount that can be charged to subscribers for their cable home wiring and the extent to which they have in fact paid for such wiring at the time of installation." The Cable Communications Policy Act of 1984, 57 both as enacted and as amended by the 1992 Act, does not include home wiring in its list of equipment and services that are

<sup>&</sup>lt;sup>54</sup>Pub. L. No. 102-385, 106 Stat. 1460, at § 3(a) (1992), to be codified, in part, at 47 U.S.C. § 543(b)(2)(C).

<sup>&</sup>lt;sup>55</sup>It should also be noted that Time Warner has challenged the legality of all rate regulation provisions of the 1992 Act generally. <u>Time Warner Entertainment Co., L.P. v. FCC</u>, Civ. No. 92-2494 (D. D.C. filed Nov. 5, 1992).

 $<sup>^{56}</sup>$ NPRM at ¶ 5.

<sup>&</sup>lt;sup>57</sup>47 U.S.C. § 521 <u>et seq</u>. (1984).

subject to rate regulation.<sup>58</sup> Indeed, Section 3(a) of the 1992 Act expressly provides that "[n]o Federal agency or State may regulate the rates for the provision of cable service except to the extent provided under this section and section 612."<sup>59</sup> Therefore, neither the Commission nor local authorities may regulate prices for subscriber acquisition of home wiring pursuant to Section 16(d).

Cable operators should be permitted to offer subscribers the ability to purchase the internal wiring at any price as may be specified and agreed to between the parties. When internal wiring is installed, most cable operators charge significantly below actual cost for such installation. Telephone companies, being a monopoly, have the market power necessary to fully recover their installation costs prior to authorizing the subscriber's telephone service. Cable operators, however, face an abundance of competition from alternate sources of entertainment and information. Accordingly, in order to promote subscriptions, cable operators almost always offer installations at a rate below cost, and sometimes at further substantial discounts, even without charge. Thus, the contention in the NPRM that

<sup>&</sup>lt;sup>58</sup>See 47 U.S.C. § 543, as amended by 1992 Act. Equipment that is subject to price regulation includes a converter box and remote control unit, if used exclusively for provision of basic service; such addressable converter box or other equipment as is necessary to access per-channel or per-program services by basic-only subscribers; and installation and additional outlet charges for basic service customers. 47 U.S.C. § 543(b)(3).

<sup>&</sup>lt;sup>59</sup>Pub. L. No. 102-385, 106 Stat. 1460, at § 3(a) (1992), to be codified, in part, at 47 U.S.C. § 543(a)(1).

subscribers may have already paid for internal wiring through installation charges is clearly erroneous.

As noted above, rate regulation issues relating to acquisition and maintenance of internal cable wiring may be relevant as the Commission specifically considers rate regulation matters relating to charges for installation and for additional outlets of cable service. On Any discussion of rates should, therefore, be addressed comprehensively in that proceeding rather than in this one.

### IX. CONCLUSION

Accordingly, for all of the reasons set forth above, the Commission should adopt home wiring rules consistent with the proposed regulation attached hereto as Appendix 1.

Respectfully submitted,

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<sup>&</sup>lt;sup>60</sup>Pub. L. No. 102-385, 106 Stat. 1460, at § 3(a) (1992), to be codified, in part, at 47 U.S.C. § 543(b)(3).

## Appendix 1

### PROPOSED REGULATION

After the effective date of this rule, upon initiation of cable television service, the cable operator shall provide the subscriber with a written explanation of all options relating to the disposition of any internal wiring to be installed within such home by the operator. If the cable operator intends to remove such wiring after termination of service, arrangements for protecting the homeowner's property against damage shall be clearly disclosed. For the purposes of this regulation, "internal wiring" means only such cable, fiber, wire or other closed transmission media as may be installed entirely within the confines of an individual dwelling unit in order to provide service exclusively to that dwelling unit, and no other equipment whatsoever.

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